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Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE
OF THE STATE OF NEW YORK, *et al.*,

Petitioners,

against

MILHELM ATTEA & BROS. INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation
and Finance of the State of New York, *et al.*,

Petitioners,

against

ELIAS H. ATTEA, JR.,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
THE NEW YORK INDIAN CIGARETTE TAX REGULATIONS ARE PREEMPTED BY THE FEDERAL INDIAN TRADER STATUTES	4
A. Indian trader preemption prevents state interference with tribal self-government and economic development	5
1. *Congress intended the Indian trader statutes to protect the Indians from the states*	5
2. *Protection from state interference remains important today*	7
3. *Indian trader preemption is a valuable bright-line rule*	10
B. The New York State Indian Cigarette Tax Regulations are preempted under conventional preemption analysis because of the explicit language of Section 261	11
C. The State's "minimal burdens" standard has no place where, as here, express statutory language resolves the question	13
D. The New York State Indian Cigarette Tax Regulations are preempted because they discriminate against Indian traders	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993) 11

Board of County Comm'rs v. Seber, 318 U.S. 705 (1943) 5

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 7

Bryan v. Itasca County, 426 U.S. 373 (1976) 5

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 7,10

Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) . . . 4,5,9,11,12

Cippolone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) 11

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 17

City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n, 898 F.2d 122 (10th Cir.), *cert. denied*, 498 U.S. 823 (1990) 15,16

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 14,17

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 6,7

Hines v. Davidowitz, 312 U.S. 52 (1941) 15,17,18

Lac Du Flambeau Band v. Stop Treaty Abuse-Wisconsin, Inc., 991 F.2d 1249 (7th Cir. 1993) 7

Milhelm Attea & Bros., Inc. v. Dep't of Taxation and Finance, 81 N.Y.2d 417, 615 N.E.2d 994, 599 N.Y.S.2d 510 (1993) 10

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 8,13,14,15

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 16

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 14

Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84 (1963) 12,18

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 3,15,19

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 16

Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376 (1960) 17

Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) 10

Rice v. Rehner, 463 U.S. 713 (1983) 14

Rice v. Santa Fe, 331 U.S. 218 (1947) 13

Seminole Nation v. United States, 316 U.S. 286 (1942) 7

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 13

Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986) 7

Toomer v. Witsell, 334 U.S. 385 (1948) 17,18

Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board, 474 U.S. 409 (1986) 12

United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876) 6,17

United States v. Kagama, 118 U.S. 375 (1886) . . 6

Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) . . . 4,6,11,12,17

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 10,13,15,17

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 10,14

Williams v. Lee, 358 U.S. 217 (1959) 8,14

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 6,17

Constitutional Provisions

U.S. Const., Art. I, § 8, cl. 3 3,6,15,16

Statutes

Act of July 22, 1790, § 1, 1 Stat. 137 6

Act of August 15, 1876, c. 289, § 5, 19 Stat. 200, 25 U.S.C. § 261 3,4,12

Indian Gaming Regulatory Act, Oct. 17, 1988, Pub.L. 100-497, § 2, 102 Stat. 2467, 25 U.S.C. § 2701, *et seq.* 7,10

25 U.S.C. §§ 232 & 233 8

25 U.S.C. §§ 261, 262 4

25 U.S.C. §§ 261-264 4

Federal Regulations

25 C.F.R. § 140 (1993) 4,12

46 Fed. Reg. 1298 (1981) 8,9

49 Fed. Reg. 25433 (1984) 9

50 Fed. Reg. 44242 (1985) 9

53 Fed. Reg. 52829 (1988) 2

58 Fed. Reg. 24442 (1993) 9

58 Fed. Reg. 56456 (1993) 9

State Regulations

20 NYCRR § 335.6(b) 5

20 NYCRR § 335.6(d)(3) 5,8,12

20 NYCRR § 335.7(c)&(d) 5,12

20 NYCRR § 335.7(d)(6) 8,12

Other Authorities

120 Cong. Rec. 29197 (1974) 13

The Federalist No. 42 at 284 (J. Cooke, ed. 1961) 6

David Owen, *Indians Dealing on New Terms*, The Financial Times, April 14, 1987, at 6 11

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BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF THE RESPONDENTS

The Oneida Indian Nation of New York submits this brief as an *amicus curiae* in support of the Respondents, Milhelm Attea & Bros., Inc. and Elias Attea, Jr., pursuant to letters of permission from counsel for the parties, filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Oneida Indian Nation of New York (the "Oneida Nation") is a federally recognized Indian nation located in central New York State. 53 Fed. Reg. 52829, 52831 (1988). The Oneida Nation is one of the Indian nations affected by the New York State Indian Cigarette Tax Regulations. The Oneida Nation operates a smokeshop and has purchased cigarettes from one of the Respondent cigarette wholesalers, Milhelm Attea & Bros., Inc.

The Indian trader statutes are a necessary bulwark against state interference with tribal sovereignty, and are important now more than ever. If the Court weakens its Indian trader preemption rulings at the request of the State of New York, it will invite state interference with tribal commerce and erode tribal autonomy. Consequently, the Oneida Indian Nation believes that the Court's decision in this case has ramifications beyond the narrow issue of cigarette taxes.

The Oneida Nation, like many Indian tribes, is engaged in significant economic and commercial activity. Such development necessarily requires trade and contracts with non-Indians. If a state can target the non-Indian side of a tribe's economic relationships and impose special regulations, that state can effectively regulate every aspect of Indian activity. The problem is particularly acute because, by virtue of federal law and inherent sovereignty, Indians frequently have market advantages that states and their non-Indian citizens wish to restrict or eliminate. If states are permitted to regulate businesses that sell goods to Indians, states will be able to use that power to interfere with tribal economic development and thus tribal self-government. As the Oneida Nation and other Indians diversify their economic activities, the opportunities and temptations for state interference by regulation of Indian traders will grow.

SUMMARY OF ARGUMENT

1. The New York State Indian Cigarette Tax Regulations specifically target Indian traders and regulate the price, quantity and kind of goods sold. The federal Indian trader statutes, however, explicitly reserve to the federal government "the sole power and authority" to regulate the "price," "quantity," and "kind" of goods sold to Indians. 25 U.S.C. § 261. These statutory terms constitute an express federal preemption of state regulation of Indian traders and embody a Congressional intent to protect Indian tribes from state interference. The State argues for an exception to Indian trader preemption, urging a balancing approach that would permit the imposition of "minimal burdens" on Indian traders. The Court never has applied a balancing or minimal burdens analysis where, as here, preemption is mandated by express statutory language. A bright-line rule of preemption is compelled by the clear language of Section 261 and is necessary to fulfill the Congressional purpose of protecting tribes against state interference through the regulation of Indian traders.

2. The State argues that this Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), authorizes the regulations at issue. In *Potawatomi*, however, the Court merely suggested that a State could enforce its laws of general application against Indian traders. The State's regulations here are not laws of general application but, rather, a complex regulatory scheme targeting only Indian traders. The Indian commerce clause, U.S. Const., Art I, § 8, cl. 3, standing alone might prohibit this type of discrimination against Indian traders. However, since Congress has acted in this sphere, it is not necessary for the Court to reach that issue. The Court should hold that the Indian trader statutes, read in tandem with the Indian commerce clause, prohibit the discrimination against Indian traders embodied in the New York State Indian Cigarette Tax Regulations.

ARGUMENT

THE NEW YORK INDIAN CIGARETTE TAX REGULATIONS ARE PREEMPTED BY THE FEDERAL INDIAN TRADER STATUTES.

Section 261 of the federal Indian trader statutes provides that the Commissioner of Indian Affairs has "the sole power and authority to appoint traders to the Indian tribes and to make . . . rules and regulations . . . specifying the kind and quantity of goods and the prices at which such goods shall be sold to Indians." Act of August 15, 1876, c. 289, § 5, 19 Stat. 200, 25 U.S.C. § 261. All persons desiring to trade with Indians are subject to the Commissioner's authority. 25 U.S.C. §§ 261, 262; *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980). Pursuant to the federal Indian trader laws, 25 U.S.C. §§ 261-264, the Bureau of Indian Affairs has promulgated regulations governing Indian traders, currently published at 25 C.F.R. § 140 (1993).

The Court has twice held that the Indian trader statutes and regulations thereunder occupy the field of sales to Indian tribes, and "no room remains for state laws imposing additional burdens upon traders." *Central Machinery*, 448 U.S. at 163-64; *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 690 (1965). In *Warren Trading Post*, the Court concluded that Congress intended that "no burden shall be imposed upon Indian traders for trading with reservation Indians except as authorized by Acts of Congress or by valid regulations promulgated under those Acts," 380 U.S. at 691, and that Arizona could not apply a gross proceeds tax to a retailer selling goods to reservation Indians. 380 U.S. at 685-86. In *Central Machinery*, the Court held that Arizona could not apply a transactions privilege tax to a company selling tractors to reservation Indians. 448 U.S. at 161.

Notwithstanding these principles, the New York State Indian Cigarette Tax Regulations are targeted directly and solely against Indian traders and tribes. 20 NYCRR § 335.6(b). The regulations control the quantity of untaxed cigarettes that can be sold to Indian tribes, and even authorize State officials to entirely prohibit sales of untaxed cigarettes to the tribes. 20 NYCRR §§ 335.7(c)&(d), 335.6(d)(3). In order to save these regulations, the State of New York invites the Court to overrule its holding in *Central Machinery*, urging the application of a "minimal burdens" standard borrowed from cases in which no federal statute was controlling.

The Court should decline that invitation. Congress has already balanced federal, state and tribal interests and has determined that states should be banned from regulating Indian traders, regardless of the burden imposed. With regard to the Indian trader statutes, Congress intended preemption to be an end in itself.

A. Indian trader preemption prevents state interference with tribal self-government and economic development.

1. *Congress intended the Indian trader statutes to protect the Indians from the states.*

From the very beginning, it has been an important function of federal law to "regulate and protect the Indians and their property against interference even by a state." *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). Of the many federal interests in maintaining exclusive federal regulation of Indian tribes, the protection of Indian tribes against local interests and state control is distinct and compelling.

Federal preemption of state law concerning Indians was of paramount importance to the first Congress, which enacted in

1790 the antecedent to the current Indian trader laws. Act of July 22, 1790, § 1, 1 Stat. 137; *Warren*, 380 U.S. at 688. The first Congress legislated pursuant to the new Constitution and its Indian commerce clause, U.S. Const. Art. I, § 8, cl. 3, which had been written to close the loopholes in the Articles of Confederation permitting state regulation of Indian commerce. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235 & n.4 (1985) (citing The Federalist No. 42 at 284 (J. Cooke, ed. 1961)). Chief Justice Marshall noted in *Worcester v. Georgia* that the goal of federal preemption was embodied in the antecedent to Section 261 enacted on March 30, 1802, and that "[t]he treaties and laws of the United States . . . provide that all intercourse with [the Indians] shall be carried on exclusively by the government of the union." 31 U.S. (6 Pet.) 515, 557 (1832).

The goal of federal preemption was still paramount when Section 261 was enacted in 1876. In that year, the Court heard a challenge to a seizure of whiskey by federal authorities, pursuant to the 1834 antecedent to the current Indian trader laws. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195-196 (1876). Holding that the whiskey could be seized, the Court noted that the Indian trader laws embodied the notion that "Congress now has the exclusive and absolute power to regulate commerce with Indian tribes" and "the only efficient way of dealing with the Indian tribes was to place them under the protection of the general government." 93 U.S. at 194.

The principle of federal protection against the states was reiterated by the Court ten years later in *United States v. Kagama*, which upheld federal criminal jurisdiction over Indian country. 118 U.S. 375 (1886). The Court identified a "duty of protection" on the part of the federal government, noting that Indians "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. at 384-85.

2. *Protection from state interference remains important today.*

Federal protection of Indian tribes from state interference remains important. Only the federal government is charged with a "unique trust relationship" with the tribes. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The states do not have this trust relationship, and do not have the fiduciary obligations that control federal dealings with the tribes. *See Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The states, in regulating trade with tribes, are also much more likely than the federal government to serve local, non-Indian commercial interests. They are also more likely to express the hostility of non-Indians who resent the economic advantages and political independence enjoyed by Indians.

Indians enjoy many privileges pursuant to federal law of which their non-Indian neighbors are likely to be jealous. These exemptions are not evils to be eradicated; they are benefits to Indian tribes arising from federally protected Indian sovereignty or from a federal policy to promote Indian welfare. For example, Indians are permitted to fish and hunt in ways forbidden to non-Indians. *See, e.g., Lac Du Flambeau Band v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1253 (7th Cir. 1993). Indians are exempt from state regulatory policies, such as gaming restrictions, to which non-Indians are subject. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987); Indian Gaming Regulatory Act, Oct. 17, 1988, Pub.L. 100-497, § 2, 102 Stat. 2467, 25 U.S.C. § 2701, *et seq.* Reservation land may not be subject to local zoning. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 444 (1989). States may not condition access to courts on a waiver of tribal sovereign immunity. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986).

If permitted to regulate Indian traders, states can dilute these privileges by imposing restrictions on those who do business with the tribes. For example, absent Indian trader preemption, states might require Indian traders to obtain a waiver of sovereign immunity in contracts with tribes, either for the benefit of the trader alone or the state government as well. Alternatively, sales of goods used in a particular Indian trade, whether spearfishing or high-tech manufacturing, could be taxed or otherwise regulated ultimately to affect a tribe's access to or use of goods in commerce. Sales and contracts could also be regulated to achieve practical control over tribal activity.

The State's regulations here are a good example of this danger. They authorize the State to embargo sales of untaxed cigarettes to selected tribes, 20 NYCRR §§ 335.6(d)(3) and 335.7(d)(6), although the Court has held that the Indians have a right, under principles of tribal sovereignty, to sell cigarettes to Indians without collecting the tax. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480 (1976).[1]

Recent regulatory developments highlight the continuing importance of the Indian trader statutes in promoting tribal self-government and economic development while preventing state interference. On April 25, 1980, the Bureau of Indian Affairs (the "BIA") proposed that the Indian trader regulations be restricted to businesses located in isolated communities where there is an absence of competition. 46 Fed. Reg. 1298 (1981). That proposal was abandoned because most comments received were strongly opposed, "both because Indian reservation consumers need the protection of the federal government and because the failure of the federal government to regulate could result in permitting more state taxation of transactions involving Indians on Indian reservations." *Id.* Thus, the federal government actively chose in 1981 to continue to occupy the field of Indian trader regulation, responding to fears of state incursions into the area.

[1] The burdens imposed on tribes by the New York State Indian Cigarette Tax Regulations violate the right of the tribes to "make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), are not authorized by 25 U.S.C. §§ 232 & 233 (granting civil and criminal jurisdiction to New York State), and are impermissible under the Court's "minimal burdens" test applied in *Moe*. However, since the regulations have been challenged under the Indian trader statutes, rather than the tribal sovereignty doctrine, we will not address those issues here.

The BIA then proposed that it "modernize the trading regulations by adopting as its regulations the consumer protection statutes of the state where the business is located." *Id.* That proposal was considered for a number of years but does not appear in the Federal Register after the Department's Semiannual Agenda in October 29, 1985. 50 Fed. Reg. 44242 (1985). The proposal, which presumably was abandoned, highlights the Executive's understanding that state laws do not apply to Indian trader transactions absent federal incorporation. The abandonment of the proposal is significant because it shows that the Executive is not inclined to surrender control over Indian trading to the States.[2]

Recently, a similar suggestion that the Indian trader regulations be repealed was proposed and, judging by its disappearance from the Department's Semiannual Agenda six months later, quickly abandoned. *Compare* Semiannual Agenda, 58 Fed. Reg. 24442, 24490 (1993) *with* Semiannual Agenda, 58 Fed. Reg. 56456, 56502 (1993). Instead, the BIA proposes to lend New York tribes the authority of the United States to enforce tribal commercial codes against Indian traders. Semiannual Agenda, 58 Fed. Reg. 56456, 56502 (1993).

These developments show that the federal government continues to use the Indian trader statutes to encourage the tribes, in partnership with the federal government, to develop politically and economically while insulated from state interference.

[2] Also during the period since *Central Machinery*, the BIA enacted new regulations governing federal government employees trading with Indians. 49 Fed. Reg. 25433 (1984).

3. *Indian trader preemption is a valuable bright-line rule.*

Indian trader preemption creates a well-settled, bright-line rule that protects Indian autonomy against state incursions. The New York Court of Appeals accepted this. *Milhelm Attea & Bros., Inc. v. Dep't of Taxation and Finance*, 81 N.Y.2d 417, 427, 615 N.E.2d 994, 998, 599 N.Y.S.2d 510, 514 (1993) (adhering to "established law regarding Federal preemption"). Any weakening of Indian trader preemption will encourage aggressive state regulation of Indian traders and engender a new round of the type of "case-by-case litigation which has plagued this area of the law for a number of years." *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring and dissenting). By contrast, if the Court adheres to a bright line of Indian trader preemption, it will "encourage[] settled expectations and, in doing so, foster[] investment by businesses and individuals." *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1915 (1992) (upholding rule that a state may not impose sales and use taxes on mail order sales).

The longstanding goal of federal Indian policy, reflected in statutes, is to "promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). The Court has consistently applied this policy when considering questions of federal preemption. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The more success the tribes enjoy in achieving economic development, the greater the temptations and opportunities for state interference by regulation of those with whom the tribes do business. As tribes develop, they necessarily must be involved with non-Indians to pursue economic activities, so that the ability of states to regulate non-Indians who deal with

tribes ultimately is the ability to regulate tribal development itself.

Tribes already are engaged in a wide variety of economic activity other than selling cigarettes and gaming. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 806 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993) (tribe manufactured military supplies and sought to expand into medical products); David Owen, *Indians Dealing on New Terms*, The Financial Times, April 14, 1987 at 6 (describing diversity of Cherokee businesses with $9 million annual payroll). Indian tribes will increasingly use some of their $6 billion annual gaming revenue, earned pursuant to federal law, to diversify into the full spectrum of economic activity. *See* Sharon Henry, *Multiplying Indian Casinos Draw Critics' Fire*, Christian Science Monitor, August 2, 1993 at 12 ($6 billion in tribal gaming revenue). Indian trader preemption allows the tribes to pursue the federal policy goals of tribal economic growth and diversification, free from state interference through the economic back door of Indian trader regulation.

B. The New York State Indian Cigarette Tax Regulations are preempted under conventional preemption analysis because of the explicit language of Section 261.

The New York State Indian Cigarette Tax Regulations are preempted without reference to special principles of Indian sovereignty, or even to the scope and purpose of the federal regulatory scheme. The regulations are invalid under the plain language of Section 261.

State law can be preempted either because of explicit language in a statute or because the structure and purpose of a statute implies a Congressional intent to occupy the field. *Cippolone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). In *Warren* and *Central Machinery*, the state taxes at issue were not explicitly preempted by the Indian trader statutes. Never-

theless, the Court held that the structure and scope of the statutes showed that Congress intended to preempt the field, and therefore the taxes. *Warren*, 380 U.S. at 691; *Central Machinery*, 448 U.S. at 163-64. In this case, preemption is even more manifest, since the text of Section 261 directly expresses the Congressional intent to displace state regulations of the "kind," "quantity" and "price" of goods sold to Indians:

> The Commissioner of Indian Affairs *shall have the sole power and authority* to . . . make such rules and regulations . . . specifying the *kind and quantity of goods and the prices at which such goods shall be sold to Indians*.

25 U.S.C. § 261 (emphasis added).

The New York State Indian Cigarette Tax Regulations require state officials to determine the quantity of cigarettes that can be sold to Indians at untaxed prices, 20 NYCRR § 335.7(c)&(d), and empower the State to block an Indian tribe's access to all untaxed cigarettes if State officials believe the regulations or the general tax laws have been violated. 20 NYCRR §§ 335.6(d)(3) & 335.7(d)(6). The State is thus setting quotas on the amount of untaxed cigarettes the Indians can receive, and reserving the right to set the quota at zero. The imposition of the targeted tax on Indian traders inevitably increases the price of cigarettes sold to Indians. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 92 (1963) (state regulations preempted because of indirect effect on natural gas prices); *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board*, 474 U.S. 409, 420 (1986) (explaining *Northern Natural Gas*). These are exactly the type of price, kind, and quantity regulations explicitly reserved to the "sole power and authority" of the Commissioner by the statute. *See, e.g.*, 25 C.F.R. § 140.17 (prohibiting the sale of cigarettes to minors).

When the language of a federal statute grants "sole power and authority" to a federal official over a particular subject

matter, there is no room for state regulation on the same subject. The precise phrase "sole power" has been quoted extensively from ERISA's legislative history to support that statute's blanket preemption. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) (quoting 120 Cong. Rec. 29197 (1974): ERISA reserves "to Federal authority the sole power to regulate the field of employee benefit plans."). Reference to "exclusive" federal "power" and "authority" as to warehouse licensing also has been held to preempt all state regulation of federally licensed warehousemen on subject matters addressed by federal law. *Rice v. Santa Fe*, 331 U.S. 218, 236 (1947). There is no reason to believe that the phrase "sole power" has any less preemptive force here than elsewhere. The conclusion of federal preemption, without reference to special principles of Indian law or even to the scope and purpose of the Indian trader regulatory scheme, is inescapable.

C. The State's "minimal burdens" standard has no place where, as here, express statutory language resolves the question.

The State essentially concedes that the federal Indian trader statutes preempt state law generally. However, the State believes that because states may require Indian tribes to collect cigarette taxes from non-Indian customers, New York may require Indian traders to collect the taxes from Indians. Petitioner's Brief at 19. The State argues that the balancing test applied in this Court's opinions in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976), and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 159-62 (1980), should be applied here, and the State tax regulations upheld because they impose only "minimal burdens" on Indian traders. Petitioner's Brief at 21-22. This argument seeks to carve an exception from Indian trader preemption that cannot be found in any of this Court's opinions or in the Indian trader statutes themselves.

Even in the often complex area of federal Indian law, the preemption inquiry remains at bottom a question of statutory construction. *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). The State's balancing approach and "minimal burdens" test never have been used when preemption can be determined from a statute's terms. The State relies upon the three-part balancing of "federal, state, and tribal interests" that is the hallmark of the tribal sovereignty doctrine. *See Rehner*, 463 U.S. at 720. That balancing test, however, should only be applied in the presence of "vague or ambiguous federal enactments." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The balancing is a mechanism by which "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Bracker*, 448 U.S. at 144. Contrary to the suggestion of the State, the balancing test has no role to play when Congress's preemptive intent is otherwise clear. "[A] State will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983).

The very cases cited by the State show that the "minimal burdens" test cannot be applied where, as here, a question is resolved by conventional preemption analysis. In *Moe*, the relevant statutes and treaties did not refer to the State's power to tax. 425 U.S. 475-77. When considering whether the State could require Indians to collect cigarette taxes from non-Indians, in the absence of a governing statute, the Court asked whether the "minimal burden" of requiring Indians to collect sales taxes from non-Indians would frustrate tribal sovereignty as articulated in *Williams v. Lee*, 358 U.S. 217, 219-20 (1959). *Moe*, 425 U.S. at 483. The Court explicitly distinguished the case of Indian traders selling to reservation Indians, because that situation was governed by a federal statute. 425 U.S. at 482.

In *Colville*, the Court was left with similarly ambiguous federal law when considering whether tribal sales taxes affected the State's power to tax reservation sales to non-Indians. 447 U.S. at 156. The Court again explicitly distinguished the situation from that of Indian traders. *Colville*, 447 U.S. at 155-56. Lacking a federal statute on point, the Court had no choice but to apply the "minimal burdens" test derived from the tribal sovereignty doctrine. 447 U.S. at 159-60. Thus, the "minimal burdens" test applied in *Moe* and *Colville* to sales by Indians to non-Indians is simply irrelevant here, where a statute expressly preempts state regulation of sales to Indians.

D. The New York State Indian Cigarette Tax Regulations are preempted because they discriminate against Indian traders.

The Court's opinion in *Potawatomi* suggests that laws of general application can be enforced against Indian traders to collect cigarette taxes. Even if that is so, the regulations here are invalid because they facially discriminate against Indian traders. The Indian commerce clause commits regulation of Indian traders to the special purview of Congress. U.S. Const., Art. I, § 8, cl. 3. Congress has acted pursuant to the Constitution by enacting the Indian trader statutes. Whatever the preemptive effect of the Indian commerce clause or the Indian trader statutes when read separately, the two read together prohibit state discrimination against the objects of federal regulation, i.e. Indian traders. *See Hines v. Davidowitz*, 312 U.S. 52, 62-66 (1941).

The State takes heart from the Court's suggestion in *Potawatomi* that a State can collect its taxes on sales by Indians to non-Indians by "assessing wholesalers who supplied unstamped cigarettes to the tribal stores." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). In *Potawatomi*, the Court was referring to *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122, 124 (10th Cir.), *cert. denied*, 498 U.S. 823 (1990). 498 U.S. at 514.

In that case, Oklahoma sued an Indian trader for non-payment of taxes on cigarettes that the State claimed had already been sold to non-Indians. *City Vending*, 898 F.2d at 124. The State's lawsuit in *City Vending* sought only to enforce laws of general application to collect taxes on sales made ultimately to non-Indians. In such circumstances, the State's lawsuit may be permissible because it is arguably not regulating the Indian trader *qua* Indian trader, although this question should be left for resolution in an appropriate case.

Here, by contrast, the New York State Indian Cigarette Tax Regulations target only Indian traders and tribes. The regulations presume that sales to Indian nations exceeding each nation's quota — as set by the State — are taxable sales. There is no requirement, as in a lawsuit, that the State prove untaxed sales have been made to non-Indians. Enforcement is simply left to the judgment of the State bureaucracy. The regulations contain no procedural protections, such as hearings, burdens of proof, and rights to present evidence, to control when and how State officials determine that Indian traders and tribes have sold too many untaxed cigarettes or should be banned from selling any at all.

The regulations thus discriminate against Indian traders by subjecting them, because they are Indian traders, to a special administrative scheme. The State's scheme includes a presumption of misconduct and deprivation of procedural protections that Indian traders would enjoy if regulated only through the State's laws of general application. It is this means of enforcement — facially discriminatory regulation of Indian traders — that is inconsistent with the Indian trader statutes, interpreted in light of the Indian commerce clause.

The Indian commerce clause, U.S. Const., Art. I, § 8, cl. 3, "vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *see Oneida Indian Nation*

v. County of Oneida, 414 U.S. 661, 670 (1974); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). The limitations on state power created by the Indian commerce clause have never been spelled out, since the Court has resolved challenges to state regulation by reference to federal statutes. *See, e.g., Warren*, 380 U.S. at 686. In *Colville*, however, the Court stated that the clause may have a "role to play in preventing undue discrimination against, or burdens on, Indian commerce." 447 U.S. at 157; *see also Colville*, 447 U.S. at 177 (Rehnquist, J., concurring and dissenting).[3] The Court should here find that Congress' legislation in an area constitutionally committed to its expertise, "conjoined with the Indian commerce clause," *Colville*, 447 U.S. at 175 (Stewart, J., concurring and dissenting), prohibits state discrimination against Indian traders.

In *Hines v. Davidowitz*, the Court rejected state regulation of resident aliens, holding that the "legal imposition of distinct, unusual and extraordinary burdens and obligations" by a state on a class of persons committed to the special protection of Congress violates the Supremacy Clause. *Hines v. Davidowitz*, 312 U.S. 52, 65-66 (1941). In *Hines*, Pennsylvania had enacted an Alien Registration Act. 312 U.S. at 62. Congress had also enacted a federal Alien Registration Act, but without express preemptive language. 312 U.S. at 60. The Court found that tradition and the Constitution had committed the regulation of resident aliens to the special province of Congress. 312 U.S. at

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[3] The prohibition on discrimination is familiar from the Interstate commerce clause, which prohibits discrimination against interstate commerce even when the state is pursuing an otherwise legitimate goal. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); *Toomer v. Witsell*, 334 U.S. 385, 406 (1948). Discrimination is also a touchstone of the protection of federal instrumentalities against state power. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 487 (1960).

62-65. Writing with respect to the regulation of aliens, the Court could have been describing the regulation of Indians, stating that it is "one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits . . . ." 312 U.S. at 68.

The Court held in *Hines* that because resident aliens were committed to the special care of Congress, and Congress had acted, state laws discriminating against resident aliens were preempted. 312 U.S. at 74. As in *Hines*, the Court here is charged with determining the preemptive scope of a federal statute enacted in an area constitutionally committed to Congress, and the Court should hold that State discrimination against Indian traders, like State discrimination against resident aliens, is forbidden.

The State has not attempted to justify its discrimination, other than by referring to difficulties in collection of its tax. New York State's discriminatory tax regulations cannot be upheld "simply because they facilitate in some measure enforcement of a valid tax." *Toomer v. Witsell*, 334 U.S. 385, 406 (1948). In *Toomer v. Witsell*, the Court considered a commerce clause challenge to a South Carolina regulation requiring all boats shrimping off the coast of that State to clean, pack and stamp (with a shrimp tax stamp) their catch in South Carolina. 334 U.S. at 403. The Court found the regulation invalid because it discriminated against shrimpers who preferred to take their catch directly out of the State, even though the regulation made it much easier for the State to collect its otherwise valid shrimp tax. 334 U.S. at 406. "[T]he problem in this case is not as to the existence or even the scope of a State's power to [tax cigarettes ultimately sold to non-Indians]; the problem is only whether the Constitution sanctions the particular means chosen by [New York] to exercise the conceded power . . . ." *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 93 (1963).

If New York State finds that it cannot collect cigarette taxes without running afoul of federal law, it "may of course seek appropriate legislation from Congress," *Potawatomi*, 498 U.S. at 514, or regulations from the Bureau of Indian Affairs under the Indian trader statutes. This Court is simply not the proper forum in which to solve the State's problem.

CONCLUSION

For the reasons stated, the decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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